MOHAMED ABU BAKAR YUSOF

v.

P.A. SYED ABOOTHAHIR P. AHMED

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 4 OF 1982]
2 AUGUST 1989

LANDLORD AND TENANT: *Rent Control - Appeal against order for vacant possession - Whether defendant a trespasser, tenant or licensee.*

CIVIL PROCEDURE: *Pleadings - Matter relied on in defence must be specifically pleaded - Property used for partnership purposes - Whether partnership property.*

This is an appeal from the decision of the learned Magistrate giving vacant possession of premises No. 56, Queen Street, Penang which were subject to rent control legislation.

The issue in this case was whether the defendant occupied the premises as a trespasser or as a tenant or as a licensee.

The plaintiff had alleged that he was the registered proprietor of the premises and that he had rented the premises to one K.K. Abdul Majid and that the latter carried on a sundry goods business under the name of K.K. Kathar Mohideen Brothers. K.K. Abdul Majid died in 1979.

Another business was also carried on at the premises known as K.K. Textiles whose partners were the deceased and the defendant. After the death the defendant had attempted to tender rentals for the months through the post but these were refused by the plaintiff. The defendant admitted that he did go to see the plaintiff to get consent to occupy the premises for purpose of continuing the textile business of K.K. Textile but the latter did not agree.

The defendant contended that he and the deceased had been carrying on the business of K.K. Textiles as partners on the premises since 31 March 1976 and he testified that upon the death of Abdul Majid his alleged widow Rabiha Bivi wished to continue the business of K.K. Textiles and to this end she had executed a power of attorney, appointing one Mohamed Sidik her attorney, with power, *inter alia*, "to administer, superintend, supervise, conduct and transact the business and other properties of the deceased situated in Penang, Malaysia."

Pursuant to this power of attorney, a registration of change of business the particulars whereof show that the partners of K.K. Textiles were the defendants and Sidik.

The plaintiff then served upon the defendant a notice to quit the premises on or before 31 July 1979 with which the defendant refused to comply.

The defendant by his defence contended that he was a lawful tenant of the premises and protected by the provisions of the Control of Rent Act 1966.

The grounds of appeal was that the tenancy was an asset of the firm K.K. Textiles of which the partners were the deceased and the defendant and so they were both joint tenants of the plaintiff. In the alternative, if the deceased alone had been the tenant, the defendant had been on the premises by the leave of the deceased, upon whose death the widow of the deceased succeeded to the tenancy by reason of the provisions of s. 16(2) of the Tenancy Act, and as the defendant continued to occupy the premises with the leave of the attorney Sidik, he was in law a licensee. Accordingly until her tenancy was determined, no action for trespass was maintainable against him.

Held:

[1] Whenever a defendant has a special ground of defence or raises an affirmative case to destroy a claim he must plead specifically the matter he relies on for this purpose. At the outset the defendant merely alleged that he was a tenant protected under the Act. He did not plead specifically the devolution of his tenancy nor did he plead by way of alternative or that he was a licensee. Strictly, the defendant should not have been allowed to lead evidence of the twofold defence he had advanced at the trial.

[2] Upon the evidence appearing in the record provided there was not a scrap of evidence of the letting of the premises to the partnership firm of K.K. Textiles. The defendant's argument, that by reason of his being a partner with the deceased, at the time of letting, he was and is a joint tenant whose tenancy continues, must fail.

[3] An essential cornerstone of the defendant's alternative submission is that there must be evidence that Rabiha Bivi was the wife of the deceased at the time of his death. The only evidence of this was the power of attorney and the testimony of the attorney Sidik. The contents of the power of attorney as to the status of Rabiha Bivi was inadmissible as evidence it being hearsay because she was never called at the trial and no attempt was made to satisfy the requirements of s. 32 of the Evidence Act. The power of attorney was executed after the matters in controversy in this dispute had arisen and its maker, Rabiha Bivi stood to benefit if the action against the defendant were dismissed. In the result there was not a scrap of evidence that the deceased and Rabiha Bivi were married.

[4] Without evidence that Rabiha Bivi was the wife of the deceased, the alternative ground of defence that the defendant occupied the premises by leave or licence of her attorney Sidik, and so the action for possession was not maintainable against him until and unless her tenancy was lawfully determined, must also fail.

Cases referred to:

Khalik v. Thai Craft Ltd. [1966] 2 MLJ 112
Re Robinson's Settlement, Grant v. Hobbs [1912] 1 Ch 717
Philips v. Philips [1974] 4 QBD 127
Alagapa Chettiar v. Coliseum Cafe [1962] MLJ 111
Keow Seong & Co. v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered [1983] 2 MLJ 103
Deverai & Ors. v. Gian Singh & Co. [1963] MLJ 173
Re Taylor [1961] 1 WLR 9
Axon v. Axon [1937] 59 CLR 395
Bramwell v. Bramwell [1942] 1 KB 370

Legislation referred to:
Civil Law Act 1956, ss. 28, 28(4)(a)
Evidence Act 1950, s. 32
Subordinate Court Rules 1980, O. 14 r. 14(2)(b), (c), (2)

For the appellant - N. Shanmugum; M/s. Shan & Gooi
For the respondent - Abu Haniffa bin Mohamed Abdullah; M/s. Sykt. Abu Haniffa

JUDGMENT

Edgar Joseph Jr J:

This was a tenant's appeal from the decision of the learned Magistrate giving vacant possession of premises No. 56, Queen Street, Penang ("the premises") which were subject to rent control legislation.

It will be more convenient to refer to the appellant and the respondent hereinafter as the defendant and the plaintiff respectively.

Both in the Court below and before me the sole question for determination was whether the defendant occupied the premises as a trespasser or as a tenant or as a licensee.

Turning to the pleadings, it will be seen that by his statement of claim the plaintiff had alleged that he was the registered proprietor of the premises (a fact which was admitted) and that he was entitled to possession thereof, the defendant being a trespasser and therefore in unlawful occupation. The claim was for vacant possession and damages for wrongful occupation with effect from 1 July 1979 and costs.

On the other hand, the defendant by his defence averred that he was a lawful tenant of the premises and protected by the provisions of the Control of Rent Act 1966, ('the Act').

Upon the pleadings, therefore, the issue before the trial Court was a simple one but the evidence and the submissions in the Court below and indeed before me disclosed issues which were not free from difficulty as will become apparent from this judgment.

The plaintiff testified that he had rented out the premises to one K.K. Abdul Majid during the Japanese occupation and that the latter carried on a sundry goods business at the premises under the name or style of "K.K. Kather Mohideen Brothers". All rent receipts were therefore made out in the name of "K.K. Kather Mohideen Brothers" whose sole proprietor K.K. Abdul Majid had died in May 1979, though a signboard bearing that name still remained suspended outside the premises up to the time of the trial. There was, however, being carried on at the premises another business known as "K.K. Textiles" whose partners were the deceased Abdul Majid and the defendant. And so, after the death of the deceased, the defendant had attempted to tender rentals for the months of May, June and July 1979 through the post but these were refused by the plaintiff. Indeed, the defendant admitted that after the death of the deceased he did go to see the plaintiff to get consent to occupy the premises for purposes of continuing the textile business of K.K. Textiles, but the latter did not agree. There was no evidence that the partnership agreement of K.K. Textiles was in writing and, if so, whether it contained a survivorship clause. The inference, therefore, is that there was no such clause, so that the partnership of K.K. Textiles stood dissolved upon the death of the deceased Abdul Majid. I mention this only in passing as some argument was pressed upon me during the hearing as to the significance of this fact to which I shall have occasion to return to later on in this judgment.

On the other hand, the defendant, had testified that he and the deceased Abdul Majid had been carrying on the business of K.K. Textiles as partners on the premises, ever since 31 March 1976 and referred to the particulars appearing in the business registration form being Exh. D5. He had further testified that upon the death of Abdul Majid in May 1979, his alleged widow, Rabiha Bivi (who at all material times appears to have been in India), wished to continue the business of K.K. Textiles and to this end she had executed a power of attorney 25 October 1979 (pp. 56-62 Appeal Record) appointing one Mohamed Sidik (DW2) her attorney, with power, *inter alia*, "to administer, superintend, supervise, conduct and transact the business and other properties of the deceased situated in Penang, Malaysia". In the first recital to the power, specific reference was made to the fact that the deceased had been carrying on business at the ground floor of the premises under the name and style of K.K. Textiles and K.K. Kader Mohideen Brothers.

It would appear also that pursuant to this power of attorney, a registration of change of business Form B was signed by Sidik on 3 March 1980 (pp. 36/37 appeal record) the particulars whereof show that the partners K.K. Textiles were the defendant (as managing partner with a 2/3 share) and Sidik (with a 1/3 share) whose date of entry into the business was given as 1 January 1980.

The defendant had also confirmed, what I had already noted above, namely, that soon after the death of the deceased, he had tendered rentals for the months of May, June and July 1979, through the post, but these had been refused by the plaintiff after which he had personally approached the plaintiff for consent to occupy the premises with a view to continuing the textile business but this was declined.

In June 1979, the plaintiff consulted his solicitors who caused to be served upon the defendant a notice to quit the premises on or before 31 July 1979 with which the defendant refused to comply and his solicitors replied stating that the defendant was a protected tenant under the Act.

Before me, broadly and summarily stated, the defendant's case was argued on two grounds, namely, that (1) the tenancy was an asset of the firm of K.K. Textiles of which the partners were the deceased and the defendant and so they were both joint tenants of the plaintiff. (2) alternatively, if the deceased alone had been the tenant, the defendant had been on the premises by the leave of the deceased, upon whose death the widow of the deceased succeeded to the tenancy by reason of the provisions of s. 16(2) of the Act, and as the defendant continued to occupy the premises with the leave of her attorney Sidik, he was in law a licensee. Accordingly until her tenancy was determined, no action for trespass was maintainable against him. (See *Khalik v. Thai Craft Ltd.*) [1966] 2 MLJ 112, 114 col 2 C to F - so Counsel's argument ran.

I must revert to the pleadings in the case and, in particular, to the defence. I have at the outset mentioned that by this defence the defendant merely alleged that he was a tenant protected under the Act. He did not condescend to plead specifically the devolution of his tenancy as alleged in his evidence. Nor did he plead, by way of alternative or at all, that he was a licensee.

Order 14 r. 14(2)(b), (c) and (2) of the Subordinate Court Rules 1980, shorn of immaterial matter, reads as follows:

> 14. (1) a party must in any pleading subsequent to a statement of claim plead specifically any matter, ...

(a) which he alleges makes any claim ... not maintainable; or

(b) which if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to para. (1), a defendant to an action for the recovery of immovable property must plead specifically every ground of defence on which he relies, and a plea that he is in possession of the immovable property by himself or his tenant is not sufficient.

It follows, therefore, that whenever a defendant has a special ground of defence or raises an affirmative case to destroy a claim he must plead specifically the matter he relies on for this purpose. As Buckley LJ said in *Re Robinson's Settlement, Grant v. Hobbs* [1912] 1 Ch 717 at p. 728 "The effect of the rule is, for reasons of practice and convenience, to require the party to tell his opponent what he is coming to Court to prove." Moreover, there is under O. 14 r. 14(2) specific provision relating to actions for recovery of immovable property and the need for particularisation.

Strictly, therefore, the defendant should not have been allowed to lead evidence of the twofold defence he had advanced at the trial. *The Annual Practice* 1985, at p. 263, emphasises that "every party must plead all material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success." So, for example, Brett LJ had occasion to remark in *Philips v. Philips* [1974] 4 QBD 127 at p. 133 "If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings."

But, to be fair to the defendant, had Counsel for the plaintiff, in the Court below, objected to the admissibility of the evidence led by the defendant as to his twofold defence, as he undoubtedly should have, Counsel for the defendant could have applied for leave to amend his defence, and no doubt the learned Magistrate would have given leave subject to the payment of costs in order to satisfy the insistent demands for justice.

In the circumstance, I shall in considering this appeal pay due regard to the twofold defence advanced on behalf of the defendant.

I shall take first of all the defendant's primary defence. The argument that a partnership, not being a legal entity, is incapable in law of being a tenant, was firmly repelled by Thomson CJ speaking for the Court of Appeal in *Alagapa Chettiar v. Coliseum Cafe* [1962] MLJ 111, 113 in the following terms:

> The defendants whoever they may be, are clearly not ghosts. A landlord does not come to a Court of Law nor does he employ a lawyer to rid his premises of ghosts. He goes to another sort of practitioner. Nor are the defendants associated in any way that gives them any legal personality which is known to the law distinct and apart from their natural personalities.

Indeed, in *Keow Seong & Co. v. Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103, the Federal Court had held that the firm name is only a convenient reference to the partners, and that when a tenancy is granted to the firm, it is effectively granted to the partners.

According to the undisputed evidence, therefore, when the plaintiff issued receipts for rent in the name of K.K. Mohideen Brothers it was cogent evidence of a tenancy granted to the deceased Abdul Majid in his business name, he being the sole proprietor of that firm. At no

time was it even claimed by the defendant that he was a partner of that firm. No doubt the deceased and the defendant were partners of the other firm, namely, K.K. Textiles, which carried on business on the ground floor of the premises. But, the fact that the deceased who retained possession of the premises had allowed it to be used by the firm of K.K. Textiles, did not mean that his tenancy thereof became an asset of the firm of K.K. Textiles.

I find analogical support for this view in a passage in *Lindley on Partnership*, 12th Edn., p. 365 entitled "Property used for partnership purposes not necessarily partnership property" quoted with approval by Hill J.A. in *Devaraj & Ors. v. Gian Singh & Co.* [1963] MLJ 173 which reads as follows:

> Again, it by no means follows that property used by all the partners for partnership purposes in partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all.

Upon the evidence appearing in the record provided there was not a scrap of evidence of letting of the premises to the partnership firm of K.K. Textiles. In other words, there was not a scrap of evidence that the tenancy of the premises formed part of the assets of the firm of K.K. Textiles. On the contrary, there was ample evidence, including the contemporary receipts, which showed that the tenancy concerned had been granted to the deceased Abdul Majid in his business name of K.K. Mohideen Brothers of which he was sole proprietor.

Consequently, the defendant's argument that by reason of his being a partner with the deceased in the partnership firm of K.K. Textiles, at the time of the letting he was and is a joint tenant whose tenancy continues, never had a leg to stand on. The primary defence of the defendant therefore fails.

I must next consider the alternative defence advanced on behalf of the defendant. This requires a discussion of the effect of the death of the deceased Abdul Majid on the tenancy he held and consequently if this had any and if so what effect on the legal position of the defendant *vis-a-vis* the premises.

It was submitted by Counsel for the defendant that, upon the death of the deceased Abdul Majid, his widow Rabiha Bivi succeeded to the tenancy notwithstanding that she was then residing on the premises regard being had to the provisions of s. 16(2) of the Act which reads:

> ... where the controlled premises or part thereof has been let or subsequently allowed by the landlord to be used as business premises, the tenant or a member of his family shall be deemed to have occupied such premises or part thereof so long as he uses such premises or part thereof for his business or trade, notwithstanding that such tenant or such member of his family does not reside therein; ...

and she having given leave to the defendant, through her attorney Sidik, to continue in occupation of the premises proceedings for ejectment against the defendant were not maintainable until and unless Rabiha Bivi's tenancy was lawfully determined. (See *Khalik v. Thai Craft Ltd.* (*ibid*)).

An essential cornerstone of the defendant's alternative submission is that there must be evidence that Rabiha Bivi was the wife of the deceased at the time of his death.

The only evidence of this was the power of attorney (Exh. D13) and the testimony of the attorney Sidik who merely said in examination-in-chief: "Abdul Majid's wife had given me power of attorney ... Power of attorney is the **only** proof that she is the widow of Abdul Majid." (Emphasis supplied.)

The question for decision regarding this part of the case is whether it was proved, on the balance of probabilities, that at the time of his death Rabiha Bivi was the wife of the deceased.

In my opinion, the contents of the power of attorney as to the status of Rabiha Bivi was inadmissible as evidence it being hearsay because she was never called at the trial. Furthermore, no attempt was made to satisfy the requirements of s. 32 of the Evidence Act (Revised - 1974), either its pre-requisites or any of the cases referred to therein. It is also noteworthy that the power of attorney was executed after the matters in controversy in this suit had arisen and its maker, Rabiha Bivi, stood to benefit if the action against the defendant were dismissed. It could not therefore be said that there was an absence of motive to misrepresent.

As for the attorney Sidik, he did not testify that the deceased and Rabiha Bivi had lived together and were accepted as man and wife; had there been such evidence, it would have raised a presumption, rebuttable only by clear and cogent evidence, that they were validly married. (See *Re Taylor*, deceased [1961] 1 WLR 9. Certainly, he did not give evidence that he was present at any ceremony of marriage involving the deceased and Rabiha Bivi, had there been such evidence it would have raised a presumption of the validity of the marriage. (See *Axon v. Axon* [1937] 59 CLR 395, 403, 404.

Sidik's own evidence, when examined by Counsel for the defendant, was that the "power of attorney is the only proof that she is the widow of Abdul Majid" and makes it clear, beyond peradventure, that his testimony on the point was based on the power of attorney alone and like the power of attorney, the assertion therein as to the donor Rabiha Bivi's status, was worthless as evidence.

In the result, there was not a scrap of evidence that the deceased and Rabiha Bivi were married although the onus in this regard was clearly on the defendant. Accordingly, in holding that such proof was afforded by the power of attorney, the learned Magistrate was, it seems to me, clearly in error. None of the reasons I have canvassed above for forming a contrary view on this point was considered by the learned Magistrate but, to be fair to her, although the point was raised before her by Counsel for the plaintiff he did not develop it in argument.

Without evidence that Rabiha Bivi was the wife of the deceased, the alternative ground of defence that the defendant occupied the premises by leave or licence of her attorney Sidik, and so the action for possession was not maintainable against him until and unless her tenancy was lawfully determined, must also fall to the ground. Without proof of the marriage, Rabiha Bivi held no tenancy of the premises in the first place and so was in no position to give leave or license to anyone to remain on the premises. *Nemo dat quod non habet.*

That, however, does not conclude this appeal because during an adjourned hearing of this appeal, Counsel for the defendant, perhaps recognising that he was clutching at a rope of sand on the issue of proof of marriage, sought to salvage the case for his client by praying in aid a further alternative submission. This is how he put it: at the time of the death of the deceased in May 1979, the Act (which abolished statutory tenancies) was in force with the result that deceased's contractual tenancy became vested in the Official Administrator and unless there was a determination thereof by service of a valid notice to quit on the Official Administrator, the claim for possession against the defendant was not maintainable.

In the first place, the facts relied on for this defence were never pleaded nor was the point taken in the Court below nor was it ever raised in the memorandum of appeal.

In the second place, putting aside these objections, it should be noted that this branch of the defendant's submission is based on the assumption that the defendant was occupying the premises by leave or license of the Official Administrator. But, I fail to see where the evidence was of such leave or license and, indeed, throughout the time he was in the witness box, the defendant did not utter a single word as to this. It seems to me therefore that there is also nothing in this last point.

In all the circumstances, I would affirm the order for possession made by the learned Magistrate. The defendant must therefore quit, vacate and yield vacant possession of the premises to the plaintiff within one month from date hereof.

I must now say a few words about the plaintiff's cross-appeal which sought to attack the orders of the learned Magistrate as regards damages and costs.

When pronouncing her decision in open Court the learned Magistrate merely announced that there would be judgment for the plaintiff but with no order as to costs. By his statement of claim, the plaintiff had prayed for vacant possession, damages for wrongful occupation from 1 July 1979, until possession was given and for costs. In her grounds of decision the learned Magistrate made it clear that when she pronounced her decision in open Court she meant to make an award of damages.

In my view, the learned Magistrate should have dealt expressly with the claim for damages by quantifying the same and stating for what period it was to run. She did nothing of the sort either when pronouncing her decision in open Court or in her grounds of decision annexed to the record. Similarly, in denying the plaintiff his costs of the action she also gave no reasons. And, I would add, though what I am going to say has nothing to do with the question of damages or costs, she did not specify when the defendant was to give the plaintiff vacant possession. Be it noted, the statements of claim was also faulty in this respect because it merely prayed for vacant possession without any mention of the time when this was to be given. These are all matters upon which the learned Magistrate should have expressly pronounced giving her reasons and leaving nothing to conjecture. In the circumstances, the plaintiff was therefore quite justified in lodging a cross-appeal.

Turning to the merits of the cross-appeal.

By s. 28(4) of the Civil Law Act 1956 (Revised - 1972), power is conferred upon the Court to award damages and/or mesne profits in actions for recovery of immovable property, when the occupant has wrongfully held over, from date of accrual of the cause of action to the date when possession is handed over.

If the Court decides to exercise that power, two questions will arise for decision; namely, (1) what was the period during which the occupant wrongfully held over? and (2) what was the quantum of damages and/or mesne profits payable?

Having regard to the circumstances of this case, as appears from this judgment, I can think of no good reason why the plaintiff should be denied their damages or *mesne* profits and, indeed, Counsel for the defendant mentioned none.

As to quantum, mesne profits are in the nature of damages for trespass (*Bramwell v. Bramwell* [1942] 1 KB 370) and they are assessed on the basis of the value of the premises at the relevant time; that is to say, at the time judgment is pronounced in the Court below.

In my opinion, regard being had to the provisions of s. 28(4)(a), the appropriate order to make is that the defendant be chargeable with double the market rental value of the premises, which in this case would be RM190 p.m., from the date of expiry of the notice to quit, which would be 1 July 1979 to the date when possession is handed over to the plaintiff. However, as this sum would be well in excess of the jurisdiction of the Magistrates' Court, I would add a rider that the damages payable be limited to the jurisdiction of that Court.

Turning to costs, the learned Magistrate, as I have already noted, gave no reason for denying the plaintiff the costs of the action. There was nothing to suggest that the plaintiff had misconducted himself and indeed Counsel for the defendant did not allege anything of the sort. In the circumstances, I feel justified in intervening on this issue though it involves an element of discretion as there is no reason why the usual rule that costs should follow the event should not apply. I accordingly order that the defendant must pay to the plaintiff the costs both here and in the Court below.

The result therefore is that the appeal is dismissed while the cross-appeal is allowed with the consequential orders aforesaid.

Also found at [1990] 1 CLJ 112